

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

HARVESTER HARRIS,

Plaintiff,

vs.

CITY OF HENDERSON, a political
subdivision of the State of Nevada; LAS
VEGAS METROPOLITAN POLICE
DEPARTMENT, a political subdivision of the
State of Nevada; SHERIFF DOUG
GILLESPIE, individually; CHIEF PATRICK
MOERS, individually; OFFICER SCOTT
NIELSON, P#4408, individually;
DETECTIVE PERDUE, individually; DOE
OFFICERS III-X; and JOHN DOES I-X,
inclusive,

Defendants.

Case No.: 2:15-cv-0337-GMN-PAL

ORDER

Pending before the Court is the Motion for Summary Judgment, (ECF No. 108), filed by Defendant Las Vegas Metropolitan Police Department (“LVMPD”). Also pending before the Court is the Motion for Summary Judgment, (ECF No. 109), filed by Defendant Scott Neilson (“Officer Neilson”). Plaintiff Harvester Harris (“Plaintiff”) filed a single Response, (ECF No. 111), to both Motions, and LVMPD and Officer Neilson (collectively “Defendants”) filed a single Reply, (ECF No. 115).

I. BACKGROUND

This case arises out of a traffic stop involving Plaintiff and Defendants Officer Scott Nielson (“Officer Nielson”) and Detective Perdue (collectively the “Officers”). Specifically, Plaintiff was working as a taxicab driver on March 8, 2013, in Las Vegas, Nevada, and he was driving south on the Interstate 15 (“I-15”) while on his way to answer a radio call. (*See* Taxicab

1 Video, Ex. 1 to Resp., ECF No. 111-1). Officer Nielson and Detective Perdue were also on the
2 I-15 at this time while on duty for the FBI's Joint Terrorism Task Force. (Perdue Depo. at 6,
3 Ex. 2 to Resp., ECF No. 111-2). Pursuant to these duties, Officer Nielson was the driver,
4 Detective Perdue was the passenger, and both Officers were driving in plain clothes and in an
5 unmarked vehicle. (Perdue Depo. at 7).

6 While on the I-15, Officer Nielson alleges that Plaintiff was speeding and changing
7 lanes rapidly. (Nielson Depo. at 9, Ex. F to LVMPD MSJ, ECF No. 108-2). After a few miles,
8 Plaintiff began to exit the freeway, and the Officers followed him. (*Id.* at 10–12). While
9 stopped at the red light on the freeway off-ramp, Officer Nielson got out of the car, approached
10 Plaintiff's taxicab, and tapped on Plaintiff's window. (Pl. Depo. at 21, Ex. A to LVMPD MSJ,
11 ECF No. 108-1). Plaintiff rolled down his window, and Officer Nielson did not show a badge
12 or announce that he was an officer. (*Id.*). Instead, Officer Nielson began speaking with Plaintiff
13 about his driving. (*Id.*). Plaintiff only discovered he was an officer by asking him if he was off
14 duty, to which Officer Nielson said, "No, I'm on duty." (*Id.*); (Tr. of Recording 2:54, Ex. G to
15 LVMPD MSJ, ECF No. 108-2).

16 Officer Nielson then continued to engage Plaintiff in a verbal confrontation concerning
17 Plaintiff's driving, and midway through the conversation, Officer Nielson asked for Plaintiff's
18 license. (Tr. of Recording 3:111). Plaintiff answered, "I'm at work. I'm at work, man," and did
19 not provide his license. (*Id.* 3:113). Officer Nielson asked for Plaintiff's license four more
20 times, to which Plaintiff either stated that he was at work, or replied with "What did I do?" (*Id.*
21 3:123-128).

22 Hearing the commotion, Detective Perdue stepped out of the Officers' car, approached
23 the passenger's side of the taxicab, hit the window with his badge, and shouted, "You think we
24 are not f***ing playing games?" (*Id.* 3:135); (*see* Taxicab Video). While Detective Perdue was
25 yelling at Plaintiff, Officer Nielson told Plaintiff multiple times to get out of the car, and

1 Detective Perdue also told Plaintiff to step out of the car. (Tr. of Recording 4:137-152).

2 Plaintiff unbuckled and turned to get out of the car, and Plaintiff states that while trying to get
3 out, Detective Perdue reached into the car, pulled Plaintiff out of his vehicle, and escorted him
4 to the back of the taxicab and the front of the Officers' car. (Pl. Depo. at 22).

5 While at the back of the taxicab, Plaintiff asserts that Officer Nielson slammed Plaintiff
6 on the roof of the Officers' car, Officer Nielson grabbed Plaintiff's fingers, and then he twisted
7 Plaintiff's fingers and placed Plaintiff in handcuffs. (*Id.* at 23). Plaintiff argues that Officer
8 Nielson injured his finger during this encounter. (*Id.* at 23-25). After further discussion
9 between Plaintiff and Officer Nielson, Officer Nielson ultimately released Plaintiff without
10 issuing a citation. (Nielson Depo. at 19).

11 Plaintiff filed the instant action on February 25, 2015. (*See* Compl., ECF No. 1). On
12 July 31, 2015, the parties filed a Stipulation to Amend Complaint, (ECF No. 25), and on
13 August 10, 2015, Plaintiff filed his First Amended Complaint ("FAC"), (ECF No. 28). On June
14 20, 2016, Plaintiff's FAC was dismissed without prejudice, and Plaintiff was granted leave to
15 file a second amended complaint, which was filed on July 5, 2016. (Dismissal Order, ECF No.
16 50); (Sec. Am. Compl., ECF No. 53).

17 On January 27, 2017, the Court granted Motions to Dismiss that terminated Defendants
18 Doug Gillespie and Chief Patrick Moers, (*see* Order, ECF No. 78). The Order also granted
19 Plaintiff leave to amend and file a third amended complaint "to cure the jurisdictional
20 deficiencies identified in this Order for [Plaintiff's] fourth, fifth, and sixth causes of action
21 regarding his state law claims against Detective Perdue." (Order 10:8-9).

22 Plaintiff filed his Third Amended Complaint ("TAC") on February 17, 2017. (TAC,
23 ECF No. 82). The TAC alleges the following causes of action: (1) 42 U.S.C. § 1983 violations
24 against Officer Nielson; (2) *Monell* claims against Defendant Las Vegas Metropolitan Police
25 Department ("LVMPD"); (3) false arrest and false imprisonment against Henderson, Detective

1 Perdue, and Officer Nielson; (4) intentional infliction of emotional distress against Henderson,
2 Detective Perdue, and Officer Nielson; and (5) negligence against Henderson, Detective
3 Perdue, and Officer Nielson (TAC ¶¶ 108–62).

4 On October 10, 2017, the Court granted Defendants’ Motion to Dismiss, (ECF No. 85),
5 and dismissed Defendants City of Henderson and Detective Perdue, (ECF No. 92). On January
6 25, 2018, remaining Defendants LVMPD and Officer Nielson filed their Motions for Summary
7 Judgment, (ECF Nos. 108, 109).

8 **II. LEGAL STANDARD**

9 The Federal Rules of Civil Procedure provide for summary adjudication when the
10 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
11 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
12 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
13 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
14 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
15 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
16 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
17 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
18 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
19 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
20 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

21 In determining summary judgment, a court applies a burden-shifting analysis. “When
22 the party moving for summary judgment would bear the burden of proof at trial, it must come
23 forward with evidence which would entitle it to a directed verdict if the evidence went
24 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
25 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*

1 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
2 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
3 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
4 essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
5 party failed to make a showing sufficient to establish an element essential to that party's case
6 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
7 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
8 the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*,
9 398 U.S. 144, 159–60 (1970).

10 If the moving party satisfies its initial burden, the burden then shifts to the opposing
11 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
12 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
13 the opposing party need not establish a material issue of fact conclusively in its favor. It is
14 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
15 parties' differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
16 *Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
17 summary judgment by relying solely on conclusory allegations that are unsupported by factual
18 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
19 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
20 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

21 At summary judgment, a court's function is not to weigh the evidence and determine the
22 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
23 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
24 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
25 not significantly probative, summary judgment may be granted. *See id.* at 249–50.

1 **III. DISCUSSION**

2 The Court will first address LVMPD's Motion for Summary Judgment regarding its
3 remaining *Monell* claim, and then it will turn to Officer Nielson's Motion for Summary
4 Judgment.

5 **A. LVMPD**

6 In the TAC, Plaintiff asserts that the "unconstitutional actions and/or omissions of
7 Defendants Officer Neilson and Detective Perdue, as well as other officers employed by or
8 acting on behalf of . . . LVMPD" were pursuant to customs, policies, practices, and procedures
9 of LVMPD. (TAC ¶ 123, ECF No. 82). Plaintiff argues that these customs and policies
10 include, *inter alia*, "[t]o arrest and or detain individuals for traffic violations by handcuffing
11 citizens and the use of pain compliance techniques on traffic stops and idly standing by and
12 allowing fellow officers to commit excessive force," and "[t]o fail to use appropriate and
13 generally accepted law enforcement procedures in requiring use of force reports to be used
14 where an injury occurs." (*Id.*).

15 LVMPD seeks summary judgment on Plaintiff's *Monell* cause of action because
16 Plaintiff "has provided no evidence of an unconstitutional policy or custom which caused him
17 injury." (LVMPD Mot. for Summ. J. ("MSJ") 3:16–17; 17:20–21, ECF No. 108). Under
18 *Monell* and its progeny, a plaintiff may hold a municipality liable under § 1983 if his injury was
19 inflicted pursuant to city policy, regulation, custom, or usage. *Chew v. Gates*, 27 F.3d 1432,
20 1444 (9th Cir. 1994) (citing *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658,
21 690–91, 694 (1978)). In order to find liability, four conditions must be satisfied: "(1) that [the
22 plaintiff] possessed a constitutional right of which he was deprived; (2) that the municipality
23 had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiff's
24 constitutional right; and (4) that the policy is the 'moving force behind the constitutional
25 violation.'" *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996).

1 “Proof of random acts or isolated events” does not fit within *Monell*’s meaning of
2 custom. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on*
3 *other grounds*, *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010). Indeed,
4 “[o]nly if a plaintiff shows that his injury resulted from a ‘permanent and well-settled’ practice
5 may liability attach for injury resulting from a local government custom.” *Id.* (*quoting City of*
6 *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (*quoting Adickes v. S.H. Kress & Co.*, 398
7 U.S. 144, 168 (1970))).

8 In the Ninth Circuit, it is well settled that a plaintiff generally cannot establish a de facto
9 policy with a single constitutional violation. *See, e.g., Christie v. Iopa*, 176 F.3d 1231, 1235
10 (9th Cir. 1999). Instead, a plaintiff’s theory must be founded upon practices of “sufficient
11 duration, frequency and consistency that the conduct has become a traditional method of
12 carrying out policy.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996); *see also McDade v.*
13 *West*, 223 F.3d 1135 (9th Cir. 2000).

14 Here, LVMPD argues that Plaintiff “has not identified a specific policy which allegedly
15 resulted in his injuries.” (LVMPD MSJ 18:18). Moreover, LVMPD states that Plaintiff asserts
16 no evidence of a custom, as Plaintiff’s “only evidence of an LVMPD custom that leads to
17 unconstitutional actions is predicated on this one isolated incident.” (*Id.* 19:5–6).

18 In response, Plaintiff argues that “there exists several other incidents that demonstrate
19 the existence on [sic] LVMPD’s de facto policies of dispensing street justice to citizens whom
20 the departments’ officers believed were being disrespectful or not listening to commands, like
21 [Officer Nielson] believed [Plaintiff] had done.” (Resp. 20:15–20). Plaintiff then cites three
22 cases from 2008 and 2009 where he alleges the LVMPD dispensed “street justice” to citizens
23 “who officers believe had committed the fictitious crime of ‘contempt of cop.’” (*Id.* 21:1–23:9).

24 In the Reply, LVMPD states that “the allegations in the cases do not provide any
25 evidence that an LVMPD custom was the proximate cause for [Officer] Nielson’s actions.”

1 (Reply 4:12–13, ECF No. 115). LVMPD continues that Plaintiff “has not shown—much less
2 alleged—how the officers in each of the cases acted according to a widespread custom.” (*Id.*
3 4:13–14).

4 The Court agrees. Plaintiff fails to provide sufficient evidence to support the allegation
5 that LVMPD has a de facto policy or custom of dispensing “street justice” to citizens. (*See*
6 Resp. 20:15–20). Although Plaintiff points to three prior cases to support his argument,
7 Plaintiff fails to connect the incidents to a supposed policy or custom of the LVMPD, rather
8 than the incidents being a result of officers acting pursuant to their own motivations and
9 judgment. *See Thompson*, 885 F.2d at 1443. Moreover, the incidents Plaintiff cites to do not
10 show a frequency or consistency that would constitute the conduct becoming “a traditional
11 method of carrying out policy.” *See Trevino*, 99 F.3d at 918. Because Plaintiff has failed to
12 present evidence creating a triable issue of fact regarding liability under § 1983 for LVMPD,
13 LVMPD’s Motion for Summary Judgment is granted.

14 **B. Officer Nielson**

15 Plaintiff asserts in his TAC that Officer Nielson violated his Fourth Amendment rights
16 because the “searching of the Plaintiff, the handcuffing of the Plaintiff, and pulling the
17 Plaintiff’s finger down was unnecessary, unreasonable, excessive force” and that the Officers
18 “overreacted to this supposed minor traffic infraction.” (TAC ¶ 110). Plaintiff additionally
19 asserts that the “officers had no other reasonable suspicion nor probable cause to believe that
20 the Plaintiff had committed a crime, was committing a crime, or was going to commit a crime.
21 (*Id.* ¶ 12). Officer Nielson asserts that he had “probable cause to arrest [Plaintiff] for reckless
22 driving” and that he “had a right to handcuff [Plaintiff] for several reasons.” (Nielson MSJ
23 4:17, 7:6–7). The Court will first address the probable cause allegations, turn to the excessive
24 force analysis, and then address Plaintiff’s state law claims.

1 ***1. Probable Cause***

2 An arrest occurs if “under the circumstances, a reasonable person would conclude that
3 he was not free to leave after brief questioning.” *United States v. Washington*, 387 F.3d 1060,
4 1069 (9th Cir. 2004) (quoting *United States v. Bravo*, 295 F.3d 1002, 1011 n. 8 (9th Cir.
5 2002)). “Unsurprisingly, it is clearly established that an arrest without probable cause violates
6 a person’s Fourth Amendment rights.” *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th
7 Cir. 1997) (citing *Kennedy v. Los Angeles Police Dep’t*, 901 F.2d 702, 706 (9th Cir. 1989)).
8 “Probable cause exists when the police know ‘reasonably trustworthy information sufficient to
9 warrant a prudent person in believing that the accused had committed or was committing an
10 offense.’” *United States v. Del Vizo*, 918 F.2d 821, 825 (9th Cir. 1990) (quoting *United States*
11 *v. Delgadillo–Velasquez*, 856 F.2d 1292, 1296 (9th Cir. 1988)). Moreover, the Supreme Court
12 recently held that probable cause is “not a high bar” and depends on the “totality of the
13 circumstances.” *See District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). When the
14 underlying facts claimed to support probable cause are not in dispute, whether those facts
15 constitute probable cause is an issue of law. *See Ornelas v. United States*, 517 U.S. 690, 696–
16 97 (1996) (holding that the inquiry is whether the rule of law as applied to the established facts
17 is or is not violated).

18 “In evaluating a custodial arrest executed by state officials, federal courts must
19 determine the reasonableness of the arrest in reference to state law governing the arrest.” *Pierce*
20 *v. Multnomah County*, 76 F.3d 1032, 1038 (9th Cir. 1996) (internal quotations omitted). In
21 Nevada, officers have the authority to arrest individuals for reckless driving pursuant to Nevada
22 Revised Statute (“NRS”) § 484B.653(1)(a). *See Edgerly v. City and Cnty. of San Francisco*,
23 599 F.3d 946, 954 (9th Cir. 2010) (holding that an officer can have probable cause for any
24 criminal offense, regardless of the stated reason for the arrest). The statute prohibits a person
25

1 from driving “a vehicle in willful or wanton disregard of the safety of persons or property.”
2 NRS § 484B.653(1)(a).

3 Here, no reasonable jury could find that probable cause did not exist for the traffic stop.
4 *See McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984) (holding that “summary judgment
5 is appropriate only if no reasonable jury could find that the officers did or did not have probable
6 cause to arrest”). In his deposition, Plaintiff agrees that he was driving on the I-15 and exited
7 the freeway at a speed of at least seventy miles an hour. (Pl.’s Depo. at 21, Ex. A to LVMPD’s
8 MSJ, ECF No. 108-1).¹ Moreover, Plaintiff admits that he was passing almost all the cars on
9 the road. (*Id.*).

10 Due to Plaintiff corroborating that he was weaving in and out of traffic, and that he was
11 going above the speed limit, these facts are undisputed causing the probable cause analysis to
12 become a question of law. *See Ornelas*, 517 U.S. at 696–97. Under Nevada law, Plaintiff
13 committed traffic violations. *See* NRS § 484B.653(1)(a). Moreover, Plaintiff did not provide
14 his license when Officer Nielson requested it while Plaintiff was in the car, thereby violating
15 NRS § 483.350.² (Pl.’s Depo. at 22, Ex. A to LVMPD’s MSJ). In viewing the totality of the
16 circumstances, Plaintiff admits to some of the traffic violations, and Plaintiff did not
17 immediately hand over his license. *See Wesby*, 138 S. Ct. at 586. Because probable cause is
18 “not a high bar,” the Court determines that Officer Nielson had probable cause to arrest
19 Plaintiff. *Id.* Accordingly, the Court grants summary judgment for Officer Nielson on the
20 probable cause allegations.

21
22

23 ¹ Although Defendants argue that the “cab video footage corroborates this testimony and indicates that he was in
24 fact driving closer to 80 mph on I-15,” (Nielson’s MSJ 4:21–22), the cab video does not, in fact, have any
indication as to speed in it. (*See* Taxicab Video, Ex. 1 to Resp., ECF No. 111-1).

25 ² “Every licensee shall have his or her driver’s license in his or her immediate possession at all times when
driving a motor vehicle and shall manually surrender the license for examination, upon demand, to a justice of
the peace, a peace officer, or a deputy of the Department.” NRS § 483.350.

2. *Excessive Force*

“In evaluating a Fourth Amendment Claim of excessive force, courts ask whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” *Glenn v. Wash. Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). Evaluating the objective reasonableness of the use of force in a given situation “requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). “The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of all the relevant circumstances.” *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc) (quoting *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 2005)).

In the Ninth Circuit, a court analyzes an excessive force claim in three stages: (1) by assessing the severity of the intrusion on the individual’s Fourth Amendment rights by evaluating the type and amount of force inflicted; (2) by evaluating the government’s interests by assessing the severity of the crime, such as whether the suspect posed an immediate threat to the officers’ or public’s safety and whether the suspect was resisting arrest or attempting to escape; and (3) by balancing the gravity of the intrusion on the individual against the government’s need for that intrusion. *Thompson v. Rahr*, 885 F.3d 582, 586 (9th Cir. 2018); *Espinosa v. City & Cty. of S.F.*, 598 F.3d 528, 537 (9th Cir. 2010); *Graham*, 490 U.S. at 396–97.

Officer Nielson argues that he is entitled to summary judgment because he “had decided to arrest” Plaintiff, because of “the fact that they were all in the middle of a busy highway off-ramp with moving traffic on both sides of them,” and because Plaintiff was allegedly “uncooperative and noncompliant,” Plaintiff had “a CCW permit,” and “it was possible that he

1 could have a weapon.” (Nielson MSJ 6:7–19). Plaintiff argues that Officer Nielson
2 “purportedly stopped [Plaintiff] because of his speed and improperly changing lanes without
3 signaling,” and therefore, “a reasonable juror could determine that there was no strong
4 governmental interest in handcuffing [Plaintiff], let alone pulling and twisting his fingers.”
5 (Resp. 14:7–13).

6 In the first stage of excessive force analysis, the Court looks to the severity of the
7 intrusion on Plaintiff’s Fourth Amendment rights by evaluating the type and amount of force
8 inflicted. *Thompson*, 885 F.3d at 586. Here, Officer Nielson was not in uniform and was in an
9 unmarked car. (Perdue Depo. at 7). He tapped on Plaintiff’s window without immediately
10 identifying himself to Plaintiff and began chastising Plaintiff’s driving. (Pl. Depo. at 21); (*see*
11 *Taxicab Video*, Ex. 1 to Resp., ECF No. 111-1). Plaintiff attempted to understand the situation,
12 had to ask if Officer Nielson was an officer, and continuously asked him what he did wrong.
13 (*See Taxicab Video*). Instead of keeping a level head, both Officers shouted at Plaintiff and
14 then pulled Plaintiff out of the car, placed Plaintiff’s hands behind his back, and held so tightly
15 onto Plaintiff’s fingers that one of them was injured, before placing Plaintiff in handcuffs. (*Id.*);
16 (Pl. Depo. at 22–23). While Officer Nielson argues that “he grabbed [Plaintiff’s] fingers as part
17 of the technique for handcuffing someone,” (Nielson MSJ 8:2–6), the Court is unconvinced that
18 handcuffing in this scenario, and the level of force used in the handcuffing, was reasonable.

19 In addressing the second stage, the Court must evaluate the government’s interest in the
20 use of force. *Thompson*, 885 F.3d at 586. *Graham* provides a non-exhaustive list of factors a
21 court considers in assessing the governmental interests at stake in relation to a use of force,
22 including “the severity of the crime at issue, whether the suspect poses an immediate threat to
23 the safety of the officers or others, and whether he is actively resisting arrest or attempting to
24 evade arrest by flight.” *Graham*, 490 U.S. at 396. “[T]he ‘most important’ *Graham* factor is
25 whether the suspect posed an ‘immediate threat to the safety of the officers or others.’” *Mattos*

1 v. *Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (quoting *Smith*, 394 F.3d at 702).
2 When considering whether there was an “immediate threat,” “a ‘simple statement by an officer
3 that he fears for his safety or the safety of others is not enough; there must be objective factors
4 to justify such a concern.” *Id.* at 441–42 (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1281
5 (9th Cir. 2001)).

6 None of these factors are present here. Plaintiff’s crime was a misdemeanor at best. *See*
7 NRS § 484B.653(1)(a) (stating that “[a] person who violates paragraph (a) of subsection 1 is
8 guilty of a misdemeanor”). Although Officer Nielson alleges that “Plaintiff had a CCW
9 permit” and “it was possible that he could have a weapon,” Officer Nielson provides no
10 evidence corroborating that he possessed that knowledge at the scene of the incident, and the
11 video of the scene validates this as this fact was never brought up, alluded to, or mentioned.
12 (*See Taxicab Video*). Moreover, Officer Nielson fails to ever indicate that he feared for his
13 safety. (*Id.*). Finally, Plaintiff did not resist arrest or attempt to evade arrest. *See, e.g., Young v.*
14 *Cnty. of L.A.*, 655 F.3d 1156, 1165 (9th Cir. 2011) (“When, as here, a suspect’s disobedience of
15 a police officer takes the form of passive noncompliance that creates a minimal disturbance and
16 indicates no threat, immediate or otherwise, to the officer or others, it will not, without more,
17 give rise to a governmental interest in the use of significant force.”). Accordingly, the Court
18 cannot determine that the government had an interest in using force.

19 The final stage of analysis is balancing the gravity of the intrusion on the individual
20 against the government’s need for that intrusion. *Thompson*, 885 F.3d at 586. Because the
21 Court cannot determine that the government had a need for the intrusion that occurred, a
22 reasonable juror could find that the intrusion was unreasonable.

23 “If the evidence, reviewed in the light most favorable to [a plaintiff], could support a
24 finding of excessive force, then the defendants are not entitled to summary judgment.” *Smith*,
25 394 F.3d at 701. “‘Because [the excessive force inquiry] nearly always requires a jury to sift

1 through disputed factual contentions, and to draw inferences therefrom . . . summary judgment
2 or judgment as a matter of law in excessive force cases should be granted sparingly.” *Id.*
3 (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002)); *see also Liston v. Cnty. of*
4 *Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir. 1997) (as amended) (“We have held repeatedly that
5 the reasonableness of force used is ordinarily a question of fact for the jury.”). Accordingly,
6 the Court denies summary judgment on Plaintiff’s excessive force claim.

7 **3. Qualified Immunity**

8 Officer Nielson asserts that “even if this Court were to find a question of fact as to
9 whether a constitutional right had been violated, [Officer] Nielson is entitled to qualified
10 immunity.” (Nielson MSJ 8:13–14). “The doctrine of qualified immunity protects government
11 officials ‘from liability for civil damages insofar as their conduct does not violate clearly
12 established statutory or constitutional rights of which a reasonable person would have known.’”
13 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800,
14 818 (1982)). “Qualified immunity gives government officials breathing room to make
15 reasonable but mistaken judgments about open legal questions. When properly applied, it
16 protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Ashcroft v.*
17 *al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). “The
18 purpose of qualified immunity is to strike a balance between the competing ‘need to hold public
19 officials accountable when they exercise power irresponsibly and the need to shield officials
20 from harassment, distraction, and liability when they perform their duties reasonably.’” *Mattos*
21 *v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (quoting *Pearson*, 555 U.S. at 231). “In
22 determining whether an officer is entitled to qualified immunity, we consider (1) whether there
23 has been a violation of a constitutional right; and (2) whether that right was clearly established
24 at the time of the officer’s alleged misconduct.” *Lal v. California*, 746 F.3d 1112, 1116 (9th
25 Cir. 2014) (citing *Pearson*, 555 U.S. at 232).

1 Here, as discussed *supra*, there are questions of fact as to whether Officer Nielson used
2 unreasonable and therefore excessive force in violation of the Fourth Amendment when
3 arresting Plaintiff. Plaintiff posed no apparent or immediate threat to the Officers as he sat in
4 his car during the exchange. (*See Taxicab Video*). He did not verbally or physically threaten
5 the Officers, and he did not attempt to restart or move his car. (*Id.*). Although Plaintiff did not
6 immediately give the Officers his license, “a failure to fully or immediately comply with an
7 officer’s orders neither rises to the level of active resistance nor justifies the application of a
8 non-trivial amount of force.” *Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012).
9 Accordingly, there are genuine issues of material fact as to whether Officer Nielson violated a
10 constitutional right.

11 “A Government official’s conduct violates clearly established law when, at the time of
12 the challenged conduct, the contours of a right are sufficiently clear that every reasonable
13 official would have understood that what he is doing violates that right.” *al-Kidd*, 563 U.S. at
14 741 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). While a case directly on point is
15 not required, “existing precedent must have placed the statutory or constitutional question
16 beyond debate.” *Id.* Clearly established law should not be defined at a “high level of
17 generality.” *Id.* at 742. This is particularly true in the context of the Fourth Amendment, where
18 “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here
19 excessive force, will apply to the factual situation the officer confronts.” *Mullenix v. Luna*, 136
20 S. Ct. 305, 308 (2015) (internal citation omitted).

21 Indeed, “[t]he principle that it is unreasonable to use significant force against a suspect
22 who was suspected of a minor crime, posed no apparent threat to officer safety, and could be
23 found not to have resisted arrest, was thus well-established in 2001, years before the events at
24 issue in this case.” *Young*, 655 F.3d at 1168. Similarly, “[t]he right to be free from excessive
25 force in handcuffing [was] clearly established in [Ninth Circuit] precedent” at least as early as

1 2003. *Luchtel v. Hagemann*, 623 F.3d 975, 989 (9th Cir. 2010) (citing *Meredith v. Erath*, 342
2 F.3d 1057, 1061 (9th Cir. 2003) (rejecting qualified immunity because it was “clearly
3 established” that the amount of force used in handcuffing the plaintiff was excessive). In short,
4 the relevant law related to the alleged uses of excessive force in this case was clearly
5 established in March 2013. Thus, given the questions of fact as to the reasonableness of force,
6 Officer Nielson is not entitled to qualified immunity based on the record now before the Court.

7 ***4. False Arrest and Imprisonment***

8 False arrest and false imprisonment claims are evaluated under the reasonableness
9 standard of the Fourth Amendment. *See Luchtel v. Hagemann*, 623 F.3d 975, 984 (9th Cir.
10 2010) (affirming summary judgment on false arrest claim because the police had probable
11 cause); *see also United States v. Manzo–Jurado*, 457 F.3d 928, 934 (9th Cir. 2006) (holding
12 that reasonable suspicion constitutes legal justification for the restraint). Therefore, probable
13 cause is an absolute defense to false arrest and false imprisonment claims. *See Luchtel*, 623
14 F.3d at 984. As previously stated, the Court concludes that Officer Nielson had probable cause
15 to stop and arrest Plaintiff for reckless driving. Accordingly, because the Court grants
16 summary judgment on the probable cause claim, the Court grants summary judgment for
17 Officer Nielson on Plaintiff’s false arrest and imprisonment claims.

18 ***5. Intentional Infliction of Emotional Distress (“IIED”)***

19 In his TAC, Plaintiff alleges that he suffered an IIED claim because of the Officers’ use
20 of “excessive force deployed upon Plaintiff,” and pursuant because “Detective Perdue yelled
21 profanity words at Plaintiff. (TAC ¶ 149). To prevail on an intentional infliction of emotional
22 distress claim, Plaintiff must establish that: (1) the defendant acted in an extreme and
23 outrageous manner; (2) the defendant intended to or recklessly disregarded the probability that
24 his conduct would cause the plaintiff emotional distress; (3) the plaintiff actually suffered
25 extreme or severe emotional distress; and (4) the defendant’s conduct caused the plaintiff’s

1 distress. *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1201 (D. Nev. 2009); *see also Miller v.*
2 *Jones*, 970 P.2d 571, 577 (Nev. 1998).

3 “Extreme and outrageous conduct also may arise from an abuse by the actor of a
4 position, or a relation with the other, which gives him actual or apparent authority over the
5 other, or power to affect his interests.” *Cehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1122
6 (D. Nev. 2009) (internal quotations omitted). “The court determines whether the defendant’s
7 conduct may be regarded as extreme and outrageous so as to permit recovery, but, where
8 reasonable people may differ, the jury [must determine] whether the conduct was extreme and
9 outrageous enough to result in liability.” *Id.* at 1121.

10 Here, based on the survival of Plaintiff’s excessive force claim, the Court cannot grant
11 summary judgment on Plaintiff’s IIED claim as “reasonable people may differ.” *Id.* Because
12 Plaintiff has proffered sufficient evidence to raise disputed issues of fact concerning the
13 Officers’ conduct, the Court denies summary judgment on this claim.

14 **6. Negligence**

15 To prevail on a claim for negligence, a plaintiff must generally show that: “(1) the
16 defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the
17 breach was the legal cause of the plaintiff’s injury; and (4) the plaintiff suffered damages.”
18 *Scialabba v. Brandise Const. Co., Inc.*, 921 P.2d 928, 930 (Nev. 1996). Under Nevada law, the
19 questions of proximate cause and reasonableness presented by a negligence claim usually
20 advance questions of fact for the jury. *Frances v. Plaza Pacific Equities*, 847 P.2d 722, 724
21 (Nev. 1993).

22 Officer Nielson argues that he is entitled to summary judgment on this claim because
23 Plaintiff’s negligence allegations are “merely a grammatical reformulation of the intentional
24 torts and constitutional violations he already alleged against Nielson.” (Nielson MSJ 14:17–18).
25 Plaintiff asserts that “a reasonable juror could conclude that [Officer Nielson] breached his

1 duties to refrain from using excessive or unreasonable force against [Plaintiff]; to refrain from
2 unreasonably creating the situation where force is used; [and] to refrain from violating
3 Plaintiff's rights guaranteed by the United States and Nevada constitutions." (*Id.* 26:16–21).

4 "Whether a defendant owes a plaintiff a duty of care is a question of law." *Scialabba v.*
5 *Brandise Const. Co., Inc.*, 921 P.2d 928, 930 (Nev. 1996). Police officers owe a duty of care to
6 the members of the general public. *Vasquez–Brenes v. Las Vegas Metro. Police Dep't*, 51
7 F.Supp.3d 999, 1014 (D. Nev. 2014). As explained previously, genuine issues of material fact
8 remain regarding whether Officer Nielson adequately assessed the necessity to use the amount
9 of force he ultimately used against Plaintiff. Accordingly, the Court denies Officer Nielson's
10 Motion on the negligence claim.

11 **7. Discretionary Immunity**

12 Officer Nielson argues, however, that he is immune to Plaintiff's state law claims
13 pursuant to Nevada's discretionary function immunity statute. (*See* Nielson MSJ 10:4–19); *see*
14 NRS § 41.032. Specifically, Nevada has waived its general state immunity under NRS
15 § 41.031. The state's waiver of immunity is not absolute; the state has retained a "discretionary
16 function" form of immunity for officials exercising policy-related or discretionary acts. *See*
17 NRS § 41.032.

18 In 2007, the Nevada Supreme Court adopted the United States Supreme Court's
19 *Berkovitz-Gaubert* two-part test regarding discretionary immunity. *See Martinez v. Maruszczak*,
20 168 P.3d 720, 722, 728–29 (Nev. 2007). Under Nevada law, state actors are entitled to
21 discretionary-function immunity under NRS § 41.032 if their decision "(1) involve[s] an
22 element of individual judgment or choice and (2) [is] based on considerations of social,
23 economic, or political policy." *Id.* at 729. "[F]ederal courts applying the *Berkovitz-Gaubert* test
24 must assess cases on their facts, keeping in mind Congress' purpose in enacting the exception:
25 to prevent judicial second-guessing of legislative and administrative decisions grounded in

1 social, economic, and political policy through the medium of an action in tort.” *See id.* at 729
2 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467
3 U.S. 797, 814 (1984) (internal quotation marks omitted)).

4 Police officers “exercise[] discretion and [are] thus generally immune from suit where
5 the act at issue require[s] ‘personal deliberation, decision, and judgment,’ rather than
6 ‘obedience to orders, or the performance of a duty in which the officer is left no choice of his
7 own.’” *Sandoval v. Las Vegas Metro. Police Dep’t*, 756 F.3d 1154, 1168 (9th Cir. 2014) (citing
8 *Davis v. City of Las Vegas*, 478 F.3d 1048, 1059 (9th Cir. 2007)). In particular, “[a]n officer’s
9 decision as to how to accomplish a particular seizure or search is generally considered a
10 discretionary determination under Nevada law, and officers are therefore immune from suit as
11 to state law claims arising therefrom in most cases.” *Davis*, 478 F.3d at 1059. However,
12 “where an officer’s actions are attributable to bad faith, immunity does not apply whether an
13 act is discretionary or not.” *Id.* (quoting *Falline v. GNLV Corp.*, 823 P.2d 888, 891–92 (Nev.
14 1991)).

15 Where an officer willfully or deliberately disregards the rights of a particular citizen
16 during the arrest or search of that citizen, the officer’s conduct results in—or is done in—bad
17 faith, and thus, the officer is not entitled to discretionary immunity. *Davis*, 478 F.3d at 1060.
18 Further, summary judgment is not appropriate where disputed issues of material fact exist with
19 respect to whether an officer’s conduct was in bad faith. *Id.* Here, as explained above, there is
20 a genuine issue of material fact regarding Officer Nielson’s conduct—specifically, his use of
21 excessive force at Plaintiff’s traffic stop. Given this contested issue of material fact, the Court
22 is precluded from granting summary judgment in favor of Officer Nielson on Plaintiff’s
23 negligence and IIED claims on the basis of discretionary immunity.

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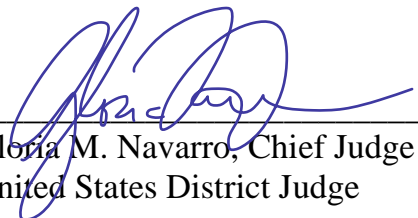
1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that LVMPD's Motion for Summary Judgment, (ECF No.
3 108), is **GRANTED**. Accordingly, LVMPD is terminated from the case.

4 **IT IS FURTHER ORDERED** that Officer Scott Nielson's Motion for Summary
5 Judgment, (ECF No. 109), is **GRANTED in part and DENIED in part**. Specifically, the
6 Court grants summary judgment for Officer Nielson on Plaintiff's probable cause and false
7 arrest claims. However, the Court denies summary judgment on Plaintiff's excessive force,
8 IIED, and negligence claims.

9 **IT IS FURTHER ORDERED** that Plaintiff and Officer Nielson shall have thirty days
10 from the issuance of this Order to file a Proposed Joint Pretrial Order.

11 **DATED** this 18 day of September, 2018.

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16 Gloria M. Navarro, Chief Judge
17 United States District Judge
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